No. 83-5424

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

GLEN BURTON AKE,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the Oklahoma Court of Criminal Appeals

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION AND OKLAHOMA PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONER

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June 2, 1984

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ALTERNATIVE STATEMENT OF QUESTIONS PRESENTED

Amici believe that the questions presented by the facts of *Ake v. State of Oklahoma* are the following:

1. Does the Constitution require a state to pay for a psychological evaluation of defendant's state of mind at the time of the offense where the defendant (1) is charged with a capital crime; (2) has pleaded insanity as his only defense; (3) has the burden of establishing a reasonable doubt as to his sanity; (4) has been found by state mental health experts to be mentally ill, incompetent to stand trial, dangerous, and incapable of determining right from wrong, less than six months after the crime; and (5) is indigent?

2. Does the Constitution require a state to provide an indigent defendant with the expert assistance necessary to cross examine and rebut expert testimony regarding his future dangerousness presented by the state to support the death penalty?

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Pursuant to Rule 36.3 of the Rules of this Court, the American Psychological Association (hereafter "APA") and the Oklahoma Psychological Association (hereafter "OPA") move for leave to file the attached brief *amici curiae.*

The reasons supporting the granting of this motion and the issues which *amici* are uniquely qualified to address

are set forth in the statement of interest of *amici* in the attached brief.

The APA has filed *amicus curiae* briefs in *Youngberg v. Romeo*, 457 U.S. 307 (1982) (the rights of mentally retarded inmates); *Blue Shield v. McCready*, 457 U.S. 465 (1982) (the standing of an insured patient receiving psychotherapy to sue under the Clayton Act); *Mills v. Rogers*, 457 U.S. 291 (1982) (the right of a competent committed mental patient to refuse psychotropic drugs); *Metropolitan Edison Co. v. People Against Nuclear Energy*, —— U.S. ——, 103 S. Ct. 1556 (1983) (the cognizability of psychological harm under the National Environmental Policy Act); *City of Akron v. Akron Center for Reproductive Health, Inc.*, —— U.S. ——, 103 S. Ct. 2481 (1983) (abortion counseling by non-physicians); and *State of New York v. Uplinger*, —— U.S. ——, —— U.S.L.W. —— (May 30, 1984) (deviant sexual conduct).

Petitioner has consented to the filing of this brief, and his letter is being filed with the clerk of this Court. Consent was requested of respondent, but has been denied. *Amici* respectfully submit that they have important, relevant expertise and information to contribute to the Court that will be useful in deciding this case, and that will not be provided by the parties.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION AND OKLAHOMA PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI*

The American Psychological Association (APA), a non-profit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. The APA has more than 55,000 members and includes the vast majority of psychologists holding doctoral degrees from accredited universities in the United States.

A substantial number of APA's members are concerned with clinical and forensic psychology, including the collection of data, development of research, and evaluation of the state of mind of criminal offenders.

The Oklahoma Psychological Association (OPA) is a nonprofit, scientific, and professional organization that was founded in 1946 for the purpose of advancing the science and profession of psychology and to promote human welfare. It represents the majority of psychologists in Oklahoma and is affiliated formally with the APA.

Psychologists in Oklahoma come from accredited universities across the United States. Their work encompasses basic and applied research, teaching, and a myriad of mental health services to hospitals, courts, clinics, schools, and the community at large. Many of Oklahoma's psychologists offer expert testimony in court proceedings where the person's mental or emotional state is an issue. An even larger number are involved in the study, diagnosis, and treatment of mental and emotional disorders and the effects of such disorders on human behavior. In this way, Oklahoma psychologists, like psychologists nationally, bring unique qualifications to matters bearing on the case at hand. Because this case originated in Oklahoma, and because Oklahoma psychologists are committed to the promotion of public welfare, OPA, representing psychology in Oklahoma, joins the APA as co-*amicus*.

Amici wish to specify that they have no direct knowledge of the guilt, innocence, sanity, or insanity of the defendant in this case, and that they in no way, implied or otherwise, condone the heinous nature of the crimes involved. Their interest as *amici* is in providing information which it is hoped will be helpful to the Court in its consideration of the questions being addressed.

The APA contributes *amicus* briefs to this Court only where the APA has special knowledge to share with the

Court. The APA regards this as one of those cases. In this instance, the APA and OPA wish to inform the Court about the nature of psychological evaluations and the need for and uses of expert testimony in insanity defense proceedings. APA and OPA believe that this information will be of assistance to the Court in deciding this case.

SUMMARY OF ARGUMENT

This case presents the Court with an important but narrow question. It is whether due process or other constitutional guarantees require the state of Oklahoma to provide defendant Ake with the means of securing an expert psychological evaluation of his state of mind at the time he committed the offense, so that he will have an adequate opportunity to support his claim of insanity and so that he can rebut testimony about aggravating circumstances presented by state experts. The only question posed by the facts of this case is whether a defendant is entitled to such an evaluation when he is indigent, is charged with a capital crime, has pleaded insanity as his only defense, bears the burden of overcoming a state imposed presumption of sanity, and has been determined by state experts and/or a state court to be mentally ill, dangerous, incompetent to stand trial, in need of psychiatric treatment, and incapable of determining right from wrong, less than six months after committing the offense. *Amici* respectfullly suggest that this Court need not determine which of these circumstances is either necessary or sufficient for such a requirement, but only that all these factors together warrant imposing on the state the minimal procedural and financial burden of paying for the psychological evaluation and assistance requested.

The Court has long recognized the special nature of capital cases and has interpreted the Constitution to require adherence to the highest standards of procedural fairness to minimize the possibility in such cases of er-

roneous determinations of criminal responsibility and excessive punishments. In this case, there is no doubt that the defendant committed the heinous offenses with which he is charged. However, there is serious question whether the defendant had sufficient understanding of the wrongfulness of his offenses to be criminally responsible for them under the laws of Oklahoma. *Amici* submit that fundamental fairness requires the state to provide defendant Ake an adequate opportunity to establish his insanity defense.

In this case, the insanity defense was Ake's only defense. In Oklahoma, the insanity defense is unlike other defenses, in that it is an affirmative defense, requiring the defendant to come forward with evidence creating a reasonable doubt about his sanity at the time of the offense before the prosecution is required to prove the defendant's sanity. Defendant was unable to sustain that burden without a psychological evaluation. More important, less than six months after the offense, Ake had been determined by state experts and by a state court to be mentally ill and incompetent to stand trial. *Amici* believe these findings indicate an unacceptably high risk of an erroneous determination in this case that defendant was sane at the time of the offense, unless the trier of fact has the benefit of information which would be provided by a psychological evaluation.

Amici submit that appropriate psychological evaluations provide relevant and probative information and opinions long recognized as admissible under federal and state rules of evidence. Although lay witnesses can also testify as to relevant facts and give their opinions about a defendant's sanity, the detection and diagnosis of mental disorders and the assessment of facts relevant to mental processes is recognized to be well beyond the competence of most lay people. *Amici* believe that the minimal procedural burden, delay and expense required to provide indigent, mentally ill defendants in capital cases with psychological evaluations performed by qualified mental health professionals to support their only defense to the charges against them is a small price to pay to maintain the integrity of our criminal process.

In addition, this Court has consistently held that where a state creates a right, such as the right to plead insanity, the state may not be arbitrary in the recognition of the right. *Amici* believe that to deny defendant an adequate opportunity to support his plea of insanity, solely because of his indigency, was to arbitrarily and effectively deprive defendant of the benefit of the insanity defense in violation of due process of law and other constitutional guarantees.

Finally, *amici* agree with the weight of professional opinion that mental health experts have substantially less ability to predict future behavior than they do to assess current or past mental conditions. Knowing this opinion, this Court nevertheless held in *Barefoot v. Estelle*, —— U.S. ——, 51 U.S.L.W. 5189 (1983), that expert predictions of dangerousness are admissible, even if unreliable, because such testimony will be submitted to cross-examination and rebuttal before it is weighed by the jury. In the present case, the state relied on the testimony of two state psychiatrists that defendant is likely to be dangerous in the future to support its request for the death penalty. But the state denied defendant the means to effectively cross-examine or rebut such testimony. The rationale of *Barefoot* surely requires that where the state presents such unreliable testimony, the defendant must be provided the means to challenge it.

Amici urge the Court to reverse the holding of the Oklahoma Court of Criminal Appeals and to remand this case for a new trial.

ARGUMENT

I. DEFENDANT WAS CONSTITUTIONALLY ENTITLED TO A STATE FINANCED PSYCHOLOGICAL EVALUATION TO GIVE HIM AN ADEQUATE OPPORTUNITY TO SUPPORT HIS INSANITY PLEA.

A. Due Process Requires that a Defendant be Provided a Psychological Evaluation of his State of Mind at the Time of the Offense Where the Defendant (1) Is Charged With a Capital Offense; (2) Has Pleaded Insanity as his Only Defense; (3) Bears the Burden of Overcoming a State Imposed Presumption of Sanity; (4) Has Been Determined by State Experts and/or a State Court to be Mentally Ill, Dangerous, Incompetent and Incapable of Telling Right from Wrong, Less Than Six Months After the Offense; and (5) Is Indigent.

1. *The Constitution Requires the Highest Standards of Procedural Fairness in Capital Cases to Minimize the Possibility of Erroneous Determinations.*

At least since 1932, when *Powell v. Alabama*, 287 U.S. 45, 71 (1932) was decided, this Court has consistently ruled that "death is different," and that the profound difference between death and all other punishments gives rise to a corresponding difference in the procedural requirements that must be met before a sentence of death can be imposed. This rule is firmly established.[1] Indeed, either in a majority opinion, plurality opinion, concurring opinion, or dissent, every member of this Court has acknowledged that death is different, and that capital cases require heightened procedural protections.[2]

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[1] *See generally*, Note, *A Matter of Life and Dealth: Due Process Protection in Capital Clemency Proceedings*, 90 YALE L. J. 889, at 889-890 and 902-903 (1981); and Radin, *Cruel Punishment and Respect for Persons: Super Due Process For Death*, 53 CAL. L. REV. 1143 (1980); and the cases and authorities cited therein.

[2] *See Eddings v. Oklahoma*, 455 U.S. 104 (1982) (O'Connor, J.); *Gardner v. Florida*, 430 U.S. 349, 357-358 (1976) (Stevens, J.), and 363-364 (White, J.); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)

In this case, the possibility for error in determining defendant Ake's criminal responsibility for the admitted homicides increased when the trial court refused to provide the defendant with a psychological evaluation of his state of mind at the time he committed the offense. There was no expert testimony of any kind concerning the defendant's state of mind at the time he committed the offense and whether he was capable of knowing the wrongfulness of his act at that time.[3]

Without testimony by expert witnesses, the jury was left to its own speculation as to Ake's state of mind. No witness experienced in assessing factual data related to mental conditions, motivation, and perception, provided the jury with informed opinion as to whether the defendant's actions at the time of the murders were consistent with an understanding of the wrongfulness of his conduct. Nor was there any expert testimony regarding the effect of drugs and alcohol on his mental processes or his likely perception of the situation in which the murders were committed.

(Burger, C. J.); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Powell & Stevens, J.J.), and 323 (Rehnquist, J.); *Furman v. Georgia*, 408 U.S. 238, 286-91 (1972) (Brennan, J.), and 358-360 (Marshall, J.); *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, Circuit Justice); *Barefoot v. Estelle*, —— U.S. ——, 51 U.S.L.W. 5189, 5198 (1983) (Marshall & Brennan, J.J.), 5202 (Blackmun, Brennan & Marshall, J.J.); and *Strickland v. Washington*, —— U.S. ——, 52 U.S.L.W. 4565, 4570 (1984) (O'Connor, J.), 4575 (Brennan, J.), and 4578 (Marshall, J.).

[3] Under Oklahoma law, culpability does not attach to the commission of an offense where the perpetrator at the time of the offense was "incapable of knowing" the wrongfulness of the act he committed. Okla. Stat. tit. 21, § 152 (1983). Each of the three experts who interviewed Ake prior to his trial testified that he had not been asked to evaluate Ake's state of mind at the time of the offense, had not done so, and therefore had no opinion on that issue.

2. *The Possibility of an Erroneous Determination of Criminal Responsibility Was Unacceptably High Where the Defendant Was Denied a Psychological Evaluation after He Had Pleaded Insanity and State Experts Had Found Him Mentally Ill, Less Than Six Months After the Crime.*

This is not a case in which a defendant asked for a court-appointed psychological evaluation for the purpose of determining whether to plead an insanity defense. Nor is it a case in which the defendant rejected the evaluation of a court-appointed expert and sought an expert of his own choosing. *See Smith v. Baldi*, 344 U.S. 561 (1952). Whether the Constitution requires the provision of state financed evaluations to indigent defendants in such situations are questions for another day. In this case, the question is whether the state must provide a psychological evaluation where the defendant has already entered an insanity plea, is indigent and has asked the court to appoint an expert selected by the court.

An expert psychological evaluation was necessary in this case to assist the defendant to overcome the presumption of sanity imposed by the state. In Oklahoma, as in many other jurisdictions, insanity is an affirmative defense. The defendant bears the burden of overcoming a presumption of sanity by producing sufficient evidence to raise a reasonable doubt as to his sanity at the time of the offense.[4] Only if he meets this burden must the

[4] Okla. Stat. tit. 21, § 152 (1983) provides that "[a]ll persons are capable of committing crimes, except those belonging to the following classes . . . (4) Lunatics, insane persons and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them, they were incapable of knowing its wrongfulness." The Oklahoma Court of Criminal Appeals has determined that "[i]n every case there is an initial presumption of sanity. This presumption remains until the defendant raises, by sufficient evidence, a reasonable doubt as to his sanity at the time of the crime. If the issue is so raised, the burden of proving the defendant's sanity beyond a reasonable doubt falls upon the State." *Ake v. State*, 663 P.2d 1, 10 (Okla. Crim. App. 1983); *Rogers v. State*, 634 P.2d 743 (Okla. Crim. App. 1981); *Richardson v. State*, 569 P.2d 1018 (Okla. Crim. App. 1977). Brief for the Petitioner, *Ake v. State*, note 17, No. 83-5424, U.S. S. Ct.

prosecution prove his sanity beyond a reasonable doubt. Therefore, access to expert psychological testimony is particularly important. In fact, an expert psychological evaluation may in many cases, like the one at bar, be the only evidence sufficient to meet this burden. The denial of an evaluation in such a case, then, would relieve the state of the burden of putting on any evidence of defendant's sanity and the burden of proving beyond a reasonable doubt that the defendant was sane.

As this Court has recognized in other contexts, expert psychological assessments of mental conditions are of considerable probative value, and in some situations are indispensible. *Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment of adults); *Parham v. J.R.*, 442 U.S. 584 (1979) (civil commitment of children); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (right to habilitation as incident to right to safety and freedom from harm). Some lower federal courts and state courts have recognized that the value of information elicited through psychological evaluations is so relevant and probative in some situations that failure to secure it amounts to ineffective assistance of counsel in violation of the Sixth Amendment. *See, e.g., Bush v. McCollum*, 231 F. Supp. 560, 565 (N.D. Tex. 1964), *aff'd*, 344 F.2d 672 (5th Cir. 1965); *United States v. Edwards*, 488 F.2d 1154, 1163 (5th Cir. 1974) (stressing the "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel"); and *Springer v. Collins*, 444 F. Supp. 1049 (D. Md. 1977).

In addition, the statutory laws of many states provide defendants with an evaluation on the issues of criminal responsibility and/or competence to stand trial.[5] Recently,

[5] Bonnie and Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, VA. L. REV. 427 (1980).

the American Bar Association's Standing Committee on Association Standards for Criminal Justice recommended in its Draft Criminal Justice Mental Health Standards that

> The accused's Sixth Amendment right to effective assistance of counsel justifies the use of a mental health or mental retardation professional consultant whenever the defense attorney honestly believes that the professional's aid could support a defense claim. For example, in virtually every homicide case, mental states are so important that the assistance of a mental health or mental retardation professional is warranted. AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, FIRST TENTATIVE DRAFT CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Section 7-3.3, Commentary (July 1983) (hereafter "ABA Draft Standards").[6]

These decisions, statutes, and standards are based on the underlying conviction that mental health professionals have information and opinions about mental processes that are both relevant and helpful to the trier of fact in criminal cases. This is particularly true with regard to the increasingly important subjective elements of crime, such as *mens rea*, diminished capacity, intoxication, and insanity. *See generally*, Bonnie, *supra* note 5; Model Penal Code §§ 2.04, 2.08 (Proposed Official Draft, 1962). Under Oklahoma law lay witnesses can give their opinion of a defendant's sanity if they have a reasonable basis upon which to do so. However, in reality, it is so unusual for a defendant pleading insanity not to support his plea with expert testimony that even if defendant Ake had put on lay witnesses, the absence of expert testimony could itself have been highly prejudicial.

The importance of psyschological evidence on subjective elements of criminal responsibility is well stated by

[6] The draft has not been approved by the House of Delegates or Board of Governors of the ABA, and is not the official policy of the ABA.

Justice Frankfurter in his dissent in *Smith v. Baldie*, in which he would have upheld the due process right of a defendant in a capital case to a psychological evaluation by an expert of his choice, in addition to the one provided by the court.

> It is not for this Court to find a want of due process in a conviction for murder sustained by the highest court of the State merely because a finding that the defendant is sane may raise gravest doubts. But it is our duty under the Fourteenth Amendment to scrutinize the procedure by which the plea of insanity failed and the defendant's life became forfeit. *A denial of adequate opportunity to sustain the plea of insanity is a denial of the safeguard of due process* in its historical procedural sense which is within the incontrovertible scope of the Due Process Clause of the Fourteenth Amendment. (Emphasis added)

344 U.S. 561, 570-571 (1952).[7]

Because defendant Ake was required to raise a doubt about his sanity without the benefit of such relevant and probative evaluation, the risk that the jury would erroneously find Ake sane was very great. *Amici* contend it was too great to comport with due process.

Whether an indigent defendant in a capital case is automatically entitled to the appointment of a psychological expert when he requests one, without any threshold showing of relevance or necessity, is not a question before this Court. In the case at bar, when the defendant requested a psychological expert, he had already pleaded the insanity defense and had been found by state selected experts and by a state court to be mentally ill and incompetent to stand trial only a short time after the offense took place.

[7] The majority in *Smith v. Baldi* found that where, unlike the case at hand, the court had ordered a psychological evaluation of the defendant's state of mind at the time of the offense, the defendant was not entitled to an additional evaluation. No examination or evaluation of the defendant Ake's state of mind at the time of the offense was made in this case.

The homicides occurred on October 15, 1979, and the defendant was apprehended in November. His behavior at arraignment in February 1980 was so bizarre that the court *sua sponte* appointed a psychiatrist to examine him in order to determine his competence to stand trial. Dr. William L. Allen examined the defendant on February 22 to determine his *present* competence, and, uncertain as to the proper determination, requested that the defendant be transferred to a state hospital for observation and testing. The trial judge ordered that transfer on March 5, and defendant remained hospitalized until May. On April 1, 1981, Dr. R. D. Garcia, Chief Forensic Psychiatrist at the state hospital, reported to the court that in his opinion, the defendant was incompetent to stand trial.

On April 10, 1980, the trial judge conducted a special hearing on defendant's competence. At that hearing Dr. Garcia and Dr. Allen concurred that the defendant was mentally ill, incompetent to stand trial, and dangerous. In addition, Dr. Allen testified that the defendant did not *currently* have the capacity to determine right from wrong or to appreciate the wrongfulness of his actions. Based on that testimony, the Court found defendant Ake to be mentally ill and in need of treatment and recommitted him to the state hospital. On May 22, Dr. Garcia reported that the defendant was taking 600 mg. of Thorazine each day and was competent to stand trial so long as he continued to take the medication. Criminal proceedings were reinstated on May 27, 1980.

At the pretrial conference on June 13, defendant's attorney requested that the court appoint a psychological expert (to be selected by the court) to assist him in presenting his insanity defense, or to provide the defendant with funds to obtain such assistance. The trial court reluctantly denied this request for state assistance, on the ground that such assistance was not authorized by state law. Thus, the trial court was fully informed about the need for a psychological evaluation of defendant's

state of mind at the time of his offense, the defendant's desire to obtain such an evaluation, and his financial inability to do so.

It is difficult to imagine a more compelling case for the right to a court-appointed psychological expert. The defendant had confessed to a horrible offense committed immediately after losing his girlfriend and termination of his employment. He had taken a large amount of drugs and alcohol at the time of the offense and had acted irrationally immediately after the crime in using a credit card issued in the name of the woman he had just murdered to finance his escape. Furthermore, witnesses had testified that the defendant had had a troubled childhood and a father who had physically abused him.

Most compelling of all, within six months of the crimes, when he finally received professional evaluations, the defendant was found by state psychiatrists to be suffering from a psychotic condition diagnosed as "paranoid schizophrenia" (more accurately, schizophrenic reaction, paranoid type).[8] Furthermore, he was found incompetent to assist in his defense and was determined by at least one psychiatrist to be unable, at the time of evaluation, to determine right from wrong. Only after he had been taking Thorazine for a period of weeks was he found sufficiently competent to be tried.

This evidence certainly supports an inference that at the time of his crime the defendant may also have been psychotic and unable to understand the difference between right and wrong. In this case, the risk was very great that, without the benefit of a psychological evaluation and expert opinion concerning the defendant's state of mind when he committed the homicides, the jury would erroneously find an insane defendant criminally responsible.

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[8] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL III (3rd ed. 1980).

3. *Having Created The Right To Plead Insanity, Oklahoma Must Accord Due Process And Other Constitutional Guarantees to those Seeking to Exercise that Right.*

Although the Constitution has not been interpreted by this Court to prohibit criminal punishment of the insane, Oklahoma, like most other states, provides by statute that persons insane at the time of the offense will not be criminally punished. Okla. Stat. tit. 21, § 152 (1983). Having created this right, the state may not be arbitrary in the implementation of it.[9] *Amici* contend that by refusing to provide defendant with a psychological evaluation, the state effectively denied defendant the defense of insanity solely by reason of his indigency; and that such denial in this case was arbitrary and prohibited by due process and other constitutional guarantees.

Although this point is discussed in more detail in the brief of petitioner Ake, *amici* agree that denial of expert assistance because of indigency, at least in the circumstances of this case, violates those constitutional guarantees.[10]

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[9] *E.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-438 (1982); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Griffin v. Illinois*, 351 U.S. 12, 18 (1955). *Cf. Boddie v. Connecticut*, 401 U.S. 378 (1971); *Hovey v. Elliott*, 167 U.S. 409 (1897). Defendant Ake's interest in life is surely as protected by due process as the property and liberty interests involved in these cases.

[10] This Court has made it clear that whether required by due process, equal protection, or the Sixth Amendment guarantee of effective assistance of counsel, the essentials of a fair trial may not be denied solely because of defendant's poverty. *Strickland v. Washington*, —— U.S. ——, 52 U.S.L.W. 4565 (May 14, 1984); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1955); *Powell v. Alabama*, 287 U.S. 45 (1932).

The American Bar Association's Standing Committee on the Association Standards for Criminal Justice has recommended that:

> The right to defend oneself against criminal charges includes an adequate opportunity to explore, through a defense-initiated mental evaluation, the availability of any defense to the existence or grade of criminal liability relating to defendant's mental condition at the time of the alleged crime. Accordingly, each jurisdiction should make available funds in a reasonable amount to pay for a mental evaluation by a qualified mental health or mental retardation professional selected by defendant in any case involving a defendant financially unable to afford such an evaluation.

ABA Draft Standards, *supra*, note 6 and accompanying text. Explaining its position the Committee stated:

> The indigent defendant's need for mental health and mental retardation professional assistance are as great as those of wealthy defendants. Paragraph (a) establishes the indigent defendant's right to obtain this professional assistance at public expense. ABA Draft Standards, *supra* note 6 and accompanying text, Section 7-3.3 Commentary.

B. The Information and Opinions Provided by Qualified Mental Health Professionals are Relevant and Useful to the Trier of Fact.

1. *The Factfinder Can Profit from Expert Testimony Regarding the Nature and Severity of Claimed Psychological Dysfunction and From Informed Estimates of the Defendant's Knowledge, Perception and Motivation at a Given Time.*

Experience with the application of the insanity defense and with individualized sentencing has yielded some conclusions about the appropriate role of mental health expertise in the criminal process. It is true that the term "insanity" for the purposes of criminal exculpation is a legal and moral term, not a medical one, and it must be applied by the legal trier of fact, not by a technical expert. Nevertheless, experts play an important role in the fact finding process by informing the ultimate decision-maker about psychological processes in general, and those of the accused in particular.

Mental health professionals use a multitude of tests and techniques to contribute three types of useful information to the trier of fact in criminal cases. First, trained mental health professionals can gather facts con-

cerning the relationship between the defendant's claimed psychological dysfunction and his behavior which a lay person might not notice or regard as significant. For instance, a defendant who suffered from acute psychological aberration at the time of an offense will not necessarily display to the jury the symptoms of that aberration, *e.g.*, delusions, hallucinations, disorientation, assaultive behavior or extreme withdrawal.[11] Yet information about those phenomena can be obtained by a trained professional. Even if the lay person can recognize in the defendant signs of cognitive or emotional disturbance, professional training or experience often may be required to elicit more detailed information.[12]

Factual data can be gathered by mental health professionals in several ways. Professional interviews with the defendant are, of course, essential.[13] In addition, most clinicians will try to obtain from other people and from written records additional information about the alleged offense, the subject's previous antisocial behavior, his general history, and relevant medical and psychological history. This information is used to verify information obtained from the accused on these subjects and to obtain information unknown to him.

The second kind of information the mental health professional can provide the factfinder is an explanation of the defendant's mental condition which takes into account the factual information and symptoms observed. By offering the trier of fact "clinically reasonable" possibilities and alternative explanations of the facts, the expert provides a framework within which to assemble otherwise unrelated pieces of information. These explanations put family, psychological, medical and personal history together into a coherent whole. As one commentator has noted "[i]f the clinician were not allowed

[11] A. GOLDSTEIN, THE INSANITY DEFENSE 25-26 (1967).

[12] Bonnie, *supra* note 5, at 459.

[13] H. DAVIDSON, FORENSIC PSYCHIATRY 35-62 (2d ed. 1965).

to express any inferences or opinions concerning his observations, the factfinder would be left with fragments of data that may actually confuse rather than enlighten." [14] Although some observers fear that juries will place too much confidence in the "scientific" nature of expert testimony and will defer too much to expert opinion, others believe that lay persons are naturally skeptical of psychiatric explanations and will weigh expert testimony carefully.[15]

Under the common law, expert testimony based on third party hearsay information was held to be inadmissible.[16] However, there has been a trend toward relaxation of this restriction. Rule 703 of the Federal Rules of Evidence now provides that the facts or data upon which an expert bases an opinion need not be admissible "if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 425 (2d ed. 1977). The admission of expert opinions based on hearsay evidence is premised on the belief that mental health professionals are aware of the biased and self-serving nature of some of the information they receive, and that they are trained to assimilate information from a wide variety of sources, to evaluate each fact, to discount some facts and emphasize others, to make their own personal observations and to come to a conclusion.[17] Thus, opinion testimony offered

[14] Bonnie, *supra* note 5, at 491.

[15] "Because laymen do not deal with abnormal behavior on a day to day basis, their intuitions are skewed in the direction of normal behavior, and they favor commonsense explanations for departures from the norm. Mental health professionals, on the other hand, deal constantly with abnormal behavior and are trained to consider explanations that do not proceed from commonsense analysis." Bonnie, *supra* note 5, at 485.

[16] 20 Am. Jur. 2d Evidence, § 866.5 (1964); Diamond & Louisell, *The Psychiatrist as an Expert Witness; Some Ruminations and Speculations*, 63 MICH. L. REV. 1335, 1351-52 (1965).

[17] Diamond & Louisell, *supra* note 16, at 1353.

by psychologists and psychiatrists is generally admissible under the Federal Rules of Evidence and the laws of Oklahoma.

Finally, mental health experts can present hypotheses of how the defendant's psychological dysfunction, if one is found, might have affected the specific conduct involved in his offense. Increasingly, courts and commentators agree that to exclude such professional opinions and explanations of aberrant psychological functioning would be to exclude an important source of insight and informed opinion and would both prejudice the defendant and confuse the factfinder.[18] See also Federal Rule of Evidence 704.[19]

2. *Professional Psychologists Are Qualified to Provide Forensic Psychological Evaluations and to Testify as Experts in Criminal Trials.*

Amici believe that the defendant in this case was entitled to a psychological evaluation of his state of mind at the time of the offense by a qualified mental health expert, and that professional psychologists are such qualified experts. Psychologists, by virtue of their training and experience, the strict evaluation of their credentials by state licensing authorities, and their participation as independent providers of mental health services in federal, state, and private third-party reimbursement plans, are recognized as fully qualified to assess and diagnose mental disability and to testify as expert witnesses on general issues such as the reliability of psychological findings, and on the mental condition of a particular person at the present or in the past.

The minimum level of training required for recognition as an independent professional psychologist is the doctoral

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[18] A. GOLDSTEIN, THE INSANITY DEFENSE 19 (1967).

[19] FED. R. EVID. 704 states: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." See also, *id.*, Advisory Committee's Notes, FED. R. EVID. 403, 701, 703.

degree,[20] which usually requires four to five years of didactic and field placement experience, with approximately three years devoted to coursework, one year to a full time supervised internship at a clinic, hospital, or other training center, and the completion of dissertation research.[21]

To offer services, including evaluations and diagnosis, to the public for a fee as an independent practitioner, all 51 jurisdictions, including Oklahoma, Okla. Stat. tit. 59, § 1351-1375 (1979), require psychologists to be lisensed or certified.[22] To further ensure a high quality of professional practice, many states have adopted ethical codes identical or quite similar to the APA's *Ethical Principles of Psychologists*, 36 AM. PSYCHOL. 633 (1981). *E.g.*, Okla. Stat. tit. 59, § 1361 (1975). The Ethical Principles deal with a variety of professional and scientific issues and mandate that psychologists practice only within their areas of expertise and seek consultation when necessary.

Recognition of both psychologists and psychiatrists as independent professionals providing mental health serv-

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[20] APA, *Standards for Providers of Psychological Services*, 32 AM. PSYCHOL. 495 (1977); Hess, *Entry Requirements for Professional Practice of Psychology*, 32 AM. PSYCHOL. 365 (1977).

[21] The basic training model of doctoral programs in professional psychology is the scientist-professional model, *i.e.*, the teaching of the basic science and methods of psychology combined with the theory and techniques of clinical intervention. See generally, APA CRITERIA FOR ACCREDITATION OF DOCTORAL TRAINING PROGRAMS AND INTERNSHIPS (Jan. 1979).

[22] LAHMAN, LICENSURE REQUIREMENTS FOR PSYCHOLOGISTS: USA AND CANADA (1978); Stigall, *Licensing and Certification*, in PROFESSIONAL PSYCHOLOGIST'S HANDBOOK (B. Sales, ed., 1983). Certification laws limit the use of the title "psychologist". Licensing laws regulate the use of the title and also define the scope of those activities for which a license is required. *E.g.*, Okla. Stat. tit. 59, § 1362 (1979). State examining boards administering laws regulating the practice of psychology also require that applicants pass an examination, either written, oral or both. *Id.* at § 1365.

ices on an equal footing is expressed not only in public attitudes but also in federal and state statutory and regulatory law and in private sector practices. *See Blue Shield v. McCready*, 457 U.S. 465 (1982); *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981). Most relevant federal statutes require direct recognition of professional psychologists as independent health-care providers, *i.e.*, as persons qualified to deliver services without mandatory referral or supervision by a physician.[23] Almost 40 states, including Oklahoma, Okla. Stat. tit. 36 §§ 2652; 6055 (1979), representing about 90% of the American population, have enacted laws establishing the direct recognition of psychological services for reimbursement purposes.[24]

Psychologists have provided information as expert witnesses in criminal trials since at least the early 1920's,

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[23] *E.g.*, Federal Employees Compensation Act, 5 U.S.C. § 8101(2) (1976); Vocational Rehabilitation Act, 29 U.S.C. § 723(a)(1) (1976); Health Maintenance Organization Act, 42 U.S.C. § 300e-1 (1976); 42 C.F.R. §§ 110.101, 110.104 (1980); Disaster Relief Act, 42 U.S.C. § 5183 (1976); 42 C.F.R. § 38.2(e) (1980); Veterans Health Care Expansion Act, 38 U.S.C. § 613(b) (1976); Comprehensive Employment and Training Act, 29 U.S.C. §§ 801 et seq. (1976); 29 C.F.R. § 94.4(bb) (1978). Two notable examples of such programs are the Federal Employee Health Benefits Program, 5 U.S.C. § 8902(k) (1976), which covers approximately 10 million federal workers and their beneficiaries, and the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), 10 U.S.C. § 1071 et seq. (1976); 32 C.F.R. § 199.12(c)(3)(iii)(a) (1981), which covers both inpatient and outpatient services for approximately 7 million dependents of military personnel, retired military personnel, and other beneficiaries.

[24] APA, RECOGNITION AND REIMBURSEMENT FOR PSYCHOLOGICAL SERVICES (1983). In effect, these laws allow consumers a "freedom of choice" among state licensed practitioners. The Health Insurance Association of America, which represents more than 300 insurance companies that write approximately 80 percent of all health insurance contracts issued by United States companies, formally supports the introduction of such "freedom of choice" legislation in the remaining states and has endorsed a model statute.

but it was not until 1940 that the issue of the admissibility of psychologists' testimony was formally addressed by the courts.[25]

Psychologists who are qualified in terms of their education and experience may offer an opinion about the presence or absence of mental disorders and their causal connection with criminal or tortious conduct.[26] A majority of those jurisdictions that have discussed the admissibility of such testimony treat psychologists and psychiatrists equally.[27] The use of expert witness testimony from psychologists in criminal trials has met with almost unanimous endorsement by commentators.[28]

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[25] See H. MUNSTERBERG, ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME (1908); S. FREUD, PSYCHO-ANALYSIS AND THE ESTABLISHMENT OF THE FACTS IN LEGAL PROCEEDINGS, in 9 THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 103 (std. ed. J. Strachey 1959) (originally published in 1906).

[26] *People v. Hawthorne*, 293 Mich. 15, 291 N.W. 205 (1940), *Hidden v. Mutual Life Insurance Co.*, 217 F.2d 818 (4th Cir. 1954), and *Jenkins v. United States*, 307 F.2d 637 (D.C. Cir. 1962) (en banc).

[27] See Gass, *The Psychologist as Expert Witness*, 38 MD. L. REV. 539, Appendix at 602-621 (1978). Psychological expert testimony has been explicitly accepted in Oklahoma. *Rogers v. State*, 634 P.2d 743 (Okla. Crim. App. 1981); *Carter v. State*, 376 P.2d 351 (Okla. Crim. App. 1962).

[28] See, *Bonnie*, *supra* note 5; Lassen, *The Psychologist as an Expert Witness in Assessing Mental Disease or Defect*, 50 A.B.A. J. 239 (1964); Levine, *Psychologist as Expert Witness in "Psychiatric" Questions*, 20 CLEV. ST. L. REV. 235 (1955); Levitt, *The Psychologist: A Neglected Legal Resource*, 45 IND. L. J. 82 (1969); Louisell, *The Psychologist in Today's Legal World*, 39 MINN. L. REV. 235 (1955); Nash, *Parameters and Distinctiveness of Psychological Testimony*, 5 PROF. PSYCHOL. 239 (1974); Pacht, Kuehn, Bassett & Nash, *The Current Status of the Psychologist as an Expert Witness*, 4 PROF. PSYCHOL. 409 (1973); Perlin, *The Legal Status of the Psychologist in the Courtroom*, in THE ROLE OF THE FORENSIC PSYCHOLOGIST 26-36 (G. Cooke, ed. 1980); Rice, *The Psychologist as Expert Witness*, 16 AMER. PSYCHOL. 691 (1961); Note, *Psychologist's Diagnosis Regarding Mental Disease or Defect Admissible on Issue of Insanity*, 8 VILL. L. REV. 119 (1962); Com-

One of psychology's most important contributions to the science of psychological evaluation has been the development, administration, and interpretation of psychological tests which measure a variety of factors such as intelligence, personality, and psychopathology.[29] *See generally* EIGHTH MENTAL MEASUREMENTS YEARBOOK (O. Buros, ed. 1978). Although none of these tests should be used alone or interpreted without reference to the particular demographic attributes of the person being tested or to the setting in which the tests have been administered, in the hands of an experienced and well-trained psychologist, they are important supplements to the evaluation interview.[30]

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ment, *The Psychologist as an Expert Witness*, 15 KAN. L. REV. 88 (1966). There has been criticism that traditional expert testimony by mental health professionals concerning the prediction of dangerousness is not justified. See, e.g., Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974); Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 VA. L. REV. 971 (1982); Gass, *The Psychologist as Expert Witness*, 38 MD. L. REV. 539 (1979). Insofar as these critiques argue that experts should not be allowed to utter opinions that are not based on firm scientific evidence or that reveal a "doctrinaire commitment to a preconceived idea," *see, PASE v. Hannon*, 506 F. Supp. 831 (N.D. Ill. 1980), *amici* agree.

[29] Assessment devices available to the professional psychologist include intelligence scales, paper-and-pencil personality tests, and projective techniques in which ambiguous stimuli are presented to the examinee to tap personality dynamics not always discernible to the lay person or to the examinee him/herself. "[T]he special assessment, testing, and intellectual/personality evaluation skills and techniques possessed by clinical psychologists uniquely prepare them for much courtroom work. . . ." Perlin, *The Legal Status of the Psychologist in the Courtroom*, in THE ROLE OF THE FORENSIC PSYCHOLOGIST 26 (G. Cooke, ed. 1980). Psychological tests are essentially objective and standardized measures of samples of behavior. A. ANASTASI, PSYCHOLOGICAL TESTING (4th ed. 1976).

[30] "A more objective method of assessing the degree of illness or the veracity of the patient may be through the psychological testing procedure which one cannot effectively fake throughout. Often one will require psychological testing to determine . . . underlying psychotic process. Occasionally the testing, especially the projective

The use of a comprehensive assessment of intelligence and psychopathology is especially important in jurisdictions, like Oklahoma, which use the M'Naghten test or one of its variants. Because that test weighs heavily the cognitive capacity of the defendant, reliance on expert testimony by psychologists, who are specifically trained to assess intellectual ability, may be of crucial significance to the defendant asserting the insanity defense.

C. Requiring The State to Provide Indigent Defendants a Psychological Evaluation would Not Place an Unreasonable Procedural or Financial Burden on the State.

Providing an expert mental health evaluation to indigent defendants need not be complex or expensive. Given the limited number of insanity pleas actually raised, and the fact that the great majority of states already provide indigent defendants the resources necessary to obtain expert mental health evaluations upon request,[31] the additional burden placed upon the criminal justice system by this requirement would be minimal. This additional burden is more than outweighed by considerations of due process and equal protection.

1. *The Procedure For Providing Indigent Defendants An Expert Mental Health Evaluation Need Not be Burdensome.*

The procedure for providing an indigent defendant with an expert mental health evaluation of his mental condition at the time of the alleged crime could be

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tests, will show a psychotic element which does not emerge on clinical examination, especially after one or two interviews. Psychological trends and patterns of personality are quite helpful in assessing an individual in forensic matters and are best determined by the testing procedure." Sadoff, *Working with the Forensic Psychologist*, in THE ROLE OF THE FORENSIC PSYCHOLOGIST 106, 109 (G. Cooke, ed. 1980).

[31] Brief for the Petitioner, *Ake v. State*, No. 83-5424, U.S. S. Ct.

straightforward and efficient. As recommended by the ABA Standing Committee on Association Standards for Criminal Justice, upon belief that such an evaluation could support a substantial legal defense, counsel for the defense could move for such an evaluation at an *ex-parte* hearing. The court should grant the motion as a matter of course unless it determines that the motion has no foundation.[32] Should the court determine that a mental health evaluation is appropriate, there are several possible mechanisms for providing it. The court may make funds available and permit the defendant to select an expert of his choice. Alternatively, the court could make an appointment from a list of experts in much the same way that indigents are appointed counsel in some jurisdictions. Discretion as to the mode of selection could remain with the states.

This Court has determined that it is a violation of due process to try a defendant who is incompetent. *Drope* v. *Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966). Pursuant to this determination, Oklahoma and other states have passed statutes permitting the defendant to move for a competency hearing.[33] Thus, where the competency of the defendant is in doubt, repetitive evaluations and hearings could be prevented by permitting counsel to move for an expert mental health evaluation of the defendant's mental condition at the time of the alleged crime when he or she moves for a competency evaluation and hearing.

2. *The Cost of Providing Indigent Defendants an Expert Mental Health Evaluation Would Not Be Unduly High.*

Despite its high degree of visibility, insanity is not often raised as a defense, and only some of those who plead insanity are indigent defendants. It is therefore

[32] ABA, Draft Standards, *supra* note 6.

[33] *See e.g.*, Okla. Stat. tit. 22, § 1175.2 (1979).

unlikely that requiring states to provide an expert mental health evaluation for indigents who have pleaded insanity would result in substantial numbers of such requests.[34] If this Court's holding were restricted to apply only to capital cases, the numbers involved would be even more limited.

Furthermore, most states already provide indigent defendants with the resources required to obtain expert mental health evaluations either by statute or by court decision.[35] Those jurisdictions which provide psychological evaluations to indigent defendants have not found the costs to be excessive. Thus a holding that the Constitution mandates the provision of such resources would affect only the handful of states which have not yet extended such protections to their citizens and would not constitute a significant financial burden for those states. The incremental costs to the criminal justice system of requiring these few jurisdictions to provide such protections would thus not be high.

[34] Innovative programs for providing expert mental health evaluations to indigent defendants can insure that the costs remain reasonable. In Virginia, for instance, the state utilizes an existing network of community mental health centers to provide such evaluations to indigent defendants. Jailed defendants are taken to the centers to be evaluated on an outpatient basis, thereby avoiding more expensive hospitalization. The mental health experts conducting such evaluations are required to have special training in forensic evaluations, usually provided by the University of Virginia Forensic Evaluation Training and Research Center. The current fee schedule provides for remuneration to the mental health centers in the sum of $100 for competency evaluations, $200 for retrospective evaluations of the defendant's state of mind at the time of the crime, and $200 for a presentencing evaluation. Where the defendant has already been evaluated once at the time of the presentencing evaluation, the fee drops to $100. Reimbursement for testimony at trial is $50 per day, plus mileage. ANNUAL REPORT OF THE UNIVERSITY OF VIRGINIA FORENSIC EVALUATION, TRANING AND RESEARCH CENTER, 1982.

[35] Brief for the petitioner *Ake v. State*, footnotes 15 and 17, No. 83-5424, U.S. S. Ct.

II. WHERE THE STATE HAS RELIED ON EXPERT PREDICTIONS OF DANGEROUSNESS TO ESTABLISH AGGRAVATING CIRCUMSTANCES SUPPORTING THE DEATH PENALTY, IT MAY NOT DENY AN INDIGENT DEFENDANT THE ASSISTANCE OF A MENTAL HEALTH PROFESSIONAL TO EFFECTIVELY CROSS-EXAMINE AND REBUT SUCH TESTIMONY.

This case poses the issue explicitly left open by this Court in *Barefoot v. Estelle*, —— U.S. ——, 51 U.S.L.W. 5189 (July 6, 1983)—whether "despite petitioner's claim of indigency, the court [may refuse] to provide an expert for petitioner" to present views opposing the state's psychiatric predictions of dangerousness admitted into evidence to support the death penalty. *Id.* at 5194. *Amici* believe that the state may not, consistent with the due process requirements announced in *Barefoot*, introduce predictions of dangerousness to justify the death penalty and then deny the indigent defendant the means of presenting opposing expert testimony. In *Barefoot* and more recently in *Strickland v. Washington*, —— U.S.——, 52 U.S.L.W. 4565 (May 14, 1984), the Court relied heavily on the truth-seeking nature of the adversary process to provide criminal defendants a constitutionally guaranteed fair trial, and the Court required that that process be adhered to in sentencing hearings. In this case, the adversary process required providing the petitioner the opportunity to secure at least one opposing expert witness, so that the state's "psychiatric testimony predicting dangerousness [could] be countered not only as erroneous in a particular case but as generally so unreliable that it should be ignored." *Barefoot v. Estelle*, 51 U.S.L.W. 5189, 5194 (1983).

This Court has recognized that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, —— U.S. ——, 51 U.S.L.W. 5220, 5222 (1983). Pursuant to this concern, the Court has undertaken to "provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused." *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The Court has ruled that the likelihood of future dangerousness is a constitutionally acceptable criterion for imposing the death penalty. *Jurek v. Texas*, 428 U.S. 262 (1976). Finally, the Court has held that psychiatric predictions of future dangerousness are admissible in evidence, even if unreliable, but only because they are subject to cross-examination and rebuttal in the adversary process. *Barefoot v. Estelle*, —— U.S. ——, 51 U.S.L.W. 5189, 5194 (1983).

Those rulings have been implemented by statute in Oklahoma: "[u]pon conviction of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. . . . In the sentencing proceeding, evidence may be presented as to any of the aggravating circumstances enumerated in this act." 21 Okla. Stat. § 701.10 (1983). Among the seven aggravating circumstances listed in the statute is the probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *Id.* at § 701.12(7) (1983).

In *Ake*, the trial court conducted the requisite sentencing proceeding, as required by statute. At that proceeding, the prosecution put on two expert psychiatric witnesses who testified that the defendant would constitute a continuing threat to society. Counsel for the defense had previously asked the court to appoint an expert for the defendant to help prepare for cross-examination and to rebut the prosecution's witnesses but his request was denied. At the close of the proceeding, the jury found that Ake would probably commit future criminal acts of violence, and he was sentenced to death.

Amici assert that where, as here, the state has presented expert testimony on this issue, denying an indigent defendant access to expert assistance and testimony necessary to the cross-examination and rebuttal of such witnesses is violative of his rights of due process, and effective assistance of counsel, and is so likely to produce an erroneous sentence as to be in contravention of the Eighth Amendment.

In *Barefoot*, the question presented was whether expert mental health testimony as to a defendant's future dangerousness was so unsound as to be likely to produce an erroneous sentence and therefore its admission was violative of the Eighth Amendment. Unlike contemporaneous psychological evaluations, or evaluations of an individual's past mental condition, predictions of *future* conduct, specifically of dangerousness, are highly unreliable.[36] Despite documentation of its unreliability, in-

[36] *See e.g.*, Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974); Ewing, *Dr. Death and The Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Cases*, 8 AM. J. LAW & MED. 407 (1983); Kozol, Boucher & Garafolo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQUENCY 371 (1971); Steadman, & Cocozza, *Psychiatry, Dangerousness and the Repetitively Violent Offender*, 69 J. CRIM. LAW & CRIMINOLOGY 226 (1978), Monahan, THE PREDICTIONS OF VIOLENT BEHAVIOR; DEVELOPMENTS IN PSYCHOLOGY AND LAW, THE MASTERS LECTURE SERIES: PSYCHOLOGY AND THE LAW 147 (Scheirer and Hammonds, ed. 1982). Despite this unreliability, however, lay people are likely to display a high degree of deference to the opinions of mental health experts. As Justice Blackmun has acknowledged, "[t]here is little question that psychiatrists are perceived by the public as having a special expertise to predict dangerousness, a perception based on psychiatrists' study of mental disease." *Barefoot v. Estelle*, —— U.S. ——, 51 U.S.L.W. 5189, 5202 (1983) (dissenting opinion). *See also* Gass, *The Psychologist as Expert Witness: Science in the Courtroom*, 38 MD. L. REV. 539, 599 (1979) (juries likely to exaggerate the significance of psychological testimony given its "aura of scientific accuracy").

cluding an *Amicus* brief filed by the American Psychiatric Association, the Court ruled that testimony predicting future dangerousness can be received in evidence. Justice White, writing for the majority, did not hold that such testimony was uniformly reliable. Rather, he expressed his conviction that the adversary system would provide the factfinder with the information necessary to weigh the testimony and reach the correct result.

> We are unconvinced . . ., at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case. *Id.* at 5195.

The majority opinion emphasized that effective cross examination and rebuttal testimony were essential to the fairness of receiving the state's expert testimony regarding future dangerousness.

> . . . [T]he rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the fact finder, who would have the benefit of cross examination and contrary evidence by the opposing party. Psychiatric testimony predicting dangerousness may be countered not only as erroneous in a particular case but as generally so unreliable that it should be ignored . . . [*J*]*urors should not be barred from hearing the views of the State's psychiatrists along with the opposing views of the defendant's doctors*" (emphasis added). *Id.* at 5194.

The majority opinion strongly implied that if the trial court had refused to provide an expert for an indigent defendant, so that there could be no "opposing views of the defendant's doctors," the Court's rationale would not support the admission of the state's expert testimony. The majority noted that there was no "contention that despite petitioner's claim of indigence, the court refused to provide an expert for petitioner," and noted that Texas

provides up to $500 for the expense of expert witnesses. *Id.* at 5194, n. 5. In this case, however, the trial court *did* refuse the request of an indigent defendant for a mental health expert to assist him.

Amici respectfully request that the Court extend the holdings of *Jurek* and *Barefoot* to their logical conclusion by holding that where, as here, the prosecution presents expert testimony as to the defendant's future dangerousness at a capital sentencing hearing, an indigent defendant is constitutionally entitled to the expert assistance essential to the integrity of the adversary process in which the reliability of such testimony must be tested.

CONCLUSION

For the reasons stated above, the judgment of the Oklahoma Court of Criminal Appeals should be reversed and the case remanded for a new trial.

Respectfully submitted,

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